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Supreme Court, U.S
FILED
NOV 30 2004
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No. 04-514

In The Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

PAUL G. SUMMERS
Attorney General
State of Tennessee

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3487

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ARGUMENT

In opposing certiorari, respondent insists that review is unwarranted because (1) a motion filed by petitioner, but never ruled upon by the Sixth Circuit, constituted "good cause" to withhold issuance of the mandate despite the mandatory language of Fed. R. App. P. 41(d)(2)(D), (2) the federal district court had already issued an order staying Thompson's execution while he litigated his competence-for-execution claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), and (3) the threshold requirements for an evidentiary hearing under 28 U.S.C. §2254(e)(2) are inapplicable to his case. None of respondent's arguments is sound.

1. Respondent argues that, because the petitioner failed to take "steps to attempt to finalize the federal [habeas] case," the Sixth Circuit should not be faulted for its failure to comply with the requirement of Fed. R. App. P. 41(d)(2)(D) that the mandate issue "immediately" upon the filing of an order of this Court denying certiorari review. Specifically, he asserts that a motion filed with the Sixth Circuit in August 2003, but never ruled upon by the court, in which petitioner sought reconsideration of an order appointing Federal Defender Services of Eastern Tennessee, Inc., to represent Thompson in an unrelated state-court proceeding, relieved the Sixth Circuit of its obligation to issue the mandate. (Brief in Opposition, pp. 21-22) Respondent points to no rule or decision of this Court supporting his contention that petitioner was under any affirmative obligation to "finalize" proceedings or "move for issuance" of the mandate; rather, Rule 41(d)(2)(D) requires *immediate* issuance of the mandate upon the filing of an order denying certiorari review of the judgment of the court of appeals. The fact that the Sixth Circuit failed to dispose of a properly-filed motion in a timely

manner does not excuse non-compliance with the unambiguous requirement of Rule 41. Indeed, the state-court proceeding at issue in petitioner's motion was concluded in October 2003 through termination of Thompson's court-appointed conservatorship, thus rendering disposition of petitioner's motion moot. Moreover, it was unnecessary for petitioner to challenge the Sixth Circuit's action in a petition for rehearing in order to preserve the issue for review by this Court. The Sixth Circuit rules, in fact, make clear that the filing of a petition for rehearing "is not a prerequisite to the filing of a petition for writ of certiorari." 6 Cir. R. 35(b).

2. Respondent's contention that the Sixth Circuit's decision did not alter the posture of the case because Thompson's execution had already been stayed by the district court is misleading. (Brief in Opposition, pp. 23-24) Thompson's *Ford* claim was ripe for review by the state and federal courts *only* because of his imminent execution date. On June 14, 2004, following expedited competency proceedings in the Tennessee state courts, Thompson filed a petition for writ of habeas corpus under 28 U.S.C. §2254. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (*Ford* claim not "second or successive" petition; when execution not imminent, competency to be executed may not be determined at that time). Seven days later, on June 21, 2004, the district court entered a "brief stay" of Thompson's execution, with the stay to expire immediately upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The court further ordered the Warden to file a response to the *Ford* petition within ten days of the date of the order. Given the Tennessee Supreme Court's thorough treatment of the competency issue after considering the reports of Thompson's three

mental health experts (App. 352) and the highly deferential standard of review under 28 U.S.C. §2254(d), Thompson's *Ford* claim likely would have been resolved summarily in favor of the Warden. In any event, the Sixth Circuit's subsequent stay order (App. 6) not only removed any possibility that Thompson's execution would take place on August 19, 2004, as scheduled since February 2004, it nullified the state-court competency proceedings previously conducted in reliance upon that execution date.

3. Finally, respondent's contention that §2254(e)(2) has been rendered "inapplicable" to his case by subsequent state-court proceedings has no record support. To bolster his argument, respondent improperly relies upon and presents as Appendices to his Brief in Opposition materials outside the record in the case below, specifically, the Petition for Writ of Error Coram Nobis filed May 29, 2001, in the Circuit Court of Coffee County, Tennessee (Respondent's Appendix B, Attachments A-B), the Reply to Response to Petition for Writ of Error Coram Nobis filed on or about July 1, 2001 (Respondent's Appendix C, Attachments A-M), the Opinion and Order of the Coffee County Circuit Court filed September 5, 2001 (Respondent's Appendix D), and the Judgment and Opinion of the Tennessee Court of Criminal Appeals from the denial of Thompson's petition for writ of error coram nobis filed August 15, 2002. (Respondent's Appendices E and F) The first full paragraph under Part V of respondent's brief in opposition consists of argument based on those materials. Because the materials listed above are not part of the record in this case and thus not before the Sixth Circuit when it rendered its decision, neither they nor any argument based upon them is properly before this Court and provides no basis to deny certiorari. *See* Sup. Ct. R. 12.7 ("The clerk of the court having possession of the

record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court"); *see also Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record").

Moreover, the sole quotation from the lower court's opinion provided by respondent in support of his contention that the Sixth Circuit "substantially complied" with §2254(e)(2) is not contained within the majority opinion of the court, but in the concurring/dissenting opinion of a single judge.[1] (Brief in Opposition, p. 38) Because the opinion of the Sixth Circuit is devoid of any justification, explanation or limitation on its mandate that the district court conduct a "full evidentiary hearing" and is thus contrary to the provisions of §2254(e)(2) and this Court's decisions, certiorari is warranted under Sup. Ct. R. 10(a) and (c).

[1] Likewise, respondent's reliance upon Judge Suhrheinrich's "fraud on the court" determination as a basis for denying certiorari review is misplaced; it does not constitute an "alternative holding" of the court as asserted by respondent. (Brief in Opposition, pp. 33-34) *See also* Petition for Writ of Certiorari, p. 14 n.2.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General
State of Tennessee

MICHAEL E. MOORE
Solicitor General

JENNIFER L. SMITH
Associate Deputy Attorney General
Counsel of Record

Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487